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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RICKY LAMAR SIMMONS, Petitioner.	2 CA-CR 2010-0351-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054467

Honorable Gus Aragón, Judge

REVIEW GRANTED; RELIEF DENIED

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V Á S Q U E Z, Presiding Judge.

¶1 Ricky Simmons petitions this court for review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.

We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In October 2005, T. was sleeping, naked, on her couch when "something wet" hit her arm. She woke to find Simmons, whom she knew, masturbating and ejaculating on her. Over the next several hours, he attempted to have intercourse with her, placed his finger in her vagina and anus, poured cocaine on her breasts and licked it off, struck her repeatedly, and threatened to kill her when she was not compliant. After the attack, T., who was seriously ill as a result of infection and taking methamphetamine, crawled out of her mobile home to the road where she was discovered by an acquaintance. Simmons's deoxyribonucleic acid (DNA) was found on her genitals.

¶3 After a jury trial, Simmons was convicted of two counts of sexual assault, one count of attempted sexual assault, and one count of sexual abuse. The trial court sentenced him to consecutive, presumptive, seven-year prison terms for his sexual assault convictions, and suspended the imposition of sentence and placed him on lifetime probation for his attempted sexual assault and sexual abuse convictions. We affirmed his convictions and sentences on appeal. *State v. Simmons*, No. 2 CA-CR 2008-0056 (memorandum decision filed Feb. 27, 2009).

¶4 Simmons filed a notice and petition for post-conviction relief, along with two supplemental petitions, arguing his trial counsel had been ineffective in failing to request an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), in failing to request a psychiatric evaluation of Simmons for mitigation purposes, and in failing to object to the admission of Simmons's interview with police by having a witness

read a transcript of the interview when a recording was available.[1] The trial court rejected those claims after a two-day evidentiary hearing.

¶5 To establish a claim of ineffective assistance of trial counsel, a defendant must show counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984). To demonstrate the requisite prejudice, a defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors," the result of the trial "would have been different." *Id.* at 694. A petitioner's failure to establish either part of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). On review, Simmons argues the trial court erred in rejecting his claims that counsel was ineffective in failing to request a *Willits* instruction and in failing to object to a witness reading a transcript of his police interview. We address each claim in turn.

Failure to Request Willits Instruction

¶6 A *Willits* instruction allows the jury to draw an inference from the state's destruction of material evidence that the lost or destroyed evidence would be unfavorable to the state. *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). A defendant is entitled to a *Willits* instruction when (1) the state fails to preserve accessible,

[1]Simmons's latter argument was raised for the first time in his second supplemental petition filed after the first day of the two-day evidentiary hearing. Although the trial court apparently did not expressly grant Simmons permission to file that additional supplemental petition, *see* Ariz. R. Crim. P. 32.6(d), it nonetheless considered and rejected the claim on its merits.

material evidence that "might tend to exonerate him" and (2) there is resulting prejudice. *Id.* The exculpatory potential of the evidence must have been apparent at the time the state lost or destroyed it. *State v. Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d 127, 133 (App. 2002). A defendant is not entitled to a *Willits* instruction "merely because a more exhaustive investigation could have been made." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). And, "a *Willits* instruction is not appropriate if the defendant fails to demonstrate that the absent evidence would have exonerated him." *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988).

¶7 Simmons's argument is difficult to parse. As we understand it, he asserts he was entitled to a *Willits* instruction because law enforcement did not adequately secure and process the scene of the crime. Simmons generally asserts that any evidence law enforcement might have found that did not support the state's case would "necessarily support [Simmons's] version of events." But Simmons cites no authority, and we find none, suggesting a *Willits* instruction is appropriate based on a generalized claim that a law enforcement investigation was substandard. *See Murray*, 184 Ariz. at 33, 906 P.2d at 566. In order to be entitled to a *Willits* instruction, a defendant must identify material evidence that was lost or destroyed by the state and demonstrate that the evidence had potential exculpatory value that was apparent before it was lost or destroyed. *See Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93; *Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d at 133. Notably, Simmons does not contest the trial court's finding that the crime scene—T.'s trailer—was in such disarray and "so full of trash and debris" that it would have been difficult to identify viable material evidence.

¶8 The only evidentiary item Simmons discusses in any detail or argues could have been exculpatory is a blanket T. had been using when Simmons assaulted her. T. stated during an interview that she had defecated on herself during his attack. Simmons reasons that had the blanket been retrieved and examined and found to contain no feces, then T.'s testimony would have been less credible. But Simmons's argument is speculative. Analysis of the blanket was at least as likely to yield inculpatory serological evidence as it was to be exculpatory. *See State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (defendant not entitled to *Willits* instruction when claim that lost/destroyed files exculpatory "entirely speculative").

¶9 Moreover, Simmons has not demonstrated the blanket would have had any evidentiary value at all, much less exculpatory value. *Cf. Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d at 133 (exculpatory value of evidence must have been apparent). The state was not aware of the blanket's existence until T. told a police officer about it approximately ten days after the attack. Although the evidence on this point is confusing, it appears the blanket either had been found by a detective approximately a month after the attack "laying outside" T.'s residence "in the dirt," or had been washed by T.'s neighbor—albeit at an unknown time.[2] The detective opined the blanket she had seen at T.'s residence had no evidentiary value because unknown people had been to the trailer, and the blanket had been sitting outside for an unknown period of time. And, even assuming T.'s neighbor

[2]Simmons asserts in his petition that T. had testified that she had washed the blanket. That is not an accurate reading of her testimony.

was in possession of the blanket T. had used when she was assaulted, washing it would have removed any serological evidence.

¶10 Simmons identifies nothing contradicting the detective's opinion or suggesting the blanket would have had some evidentiary value had the state retrieved it immediately upon learning of its existence—even assuming it would have been able to do so. Nor has he demonstrated that the blanket, if the neighbor possessed it at all, had not been washed before the state could have retrieved it. Thus, he has not established he was entitled to a *Willits* instruction and, therefore, he has not demonstrated his trial counsel was ineffective in failing to request such an instruction. *See Strickland*, 466 U.S. at 687-88, 692.

Reading of Police Interview

¶11 Simmons also asserts his trial counsel was ineffective in failing to object to a witness reading to the jury Simmons's statement to police when a recording of his statement was available. On the third day of trial, the state informed the trial court that it had not prepared to use that statement in its case-in-chief because Simmons's former counsel had told it that Simmons would testify at trial. But, based on Simmons's opening statement, the state surmised that Simmons would not, in fact, testify and therefore wished to present his statement before resting. The state observed, however, that the interview recording contained information Simmons likely would want redacted and that it had not had the opportunity to produce a redacted version of the interview. The state requested permission to have a police detective read from a transcript certain parts of

Simmons's interview. Simmons's counsel did not object to this procedure, and the detective read Simmons's interview to the jury.

¶12 Simmons asserts his counsel should have objected based on Rule 1002, Ariz. R. Evid., because the transcript was not the best available evidence of his interview. He contends, without citation to supporting evidence, that the detective's reading of the interview prejudiced him because the detective added "inflections and mannerisms not attributed to [him] but those that suggest an unbelievability of the statement being read." Without evidentiary support, this argument is meritless. Indeed, the trial court expressly found the detective accurately "portrayed what [Simmons] told the police."

¶13 Simmons's claim that the procedure "detrimentally highlighted [his] decision not to testify" is also without merit. Simmons does not argue that a redacted version of his recorded statement would have been inadmissible and does not explain how the detective's reading of his statement, as opposed to the recording, would have had a different effect on the jury's view of his decision not to testify—which the jury was expressly instructed not to consider. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996) (jurors presumed to follow instructions). Insofar as Simmons suggests the state would have been unable to timely prepare and present a redacted recording had his attorney objected to the transcript being read, he identifies nothing in the record supporting that claim. Thus, even assuming counsel should have objected, Simmons has failed to demonstrate he was prejudiced by his counsel's failure to do so. *See Strickland*, 466 U.S. at 687-88, 692; *Salazar*, 146 Ariz. at 541, 707 P.2d at 945.

¶14 For the reasons stated, although we grant review of Simmons's petition, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge